

RECENT DEVELOPMENTS IN BLOG LAW

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Blog Law Developments: Liability Risks

- **What have emerged as the key risks in blogging?**
 - Defamation
 - Copyright Issues
 - Potential Disclosure of Trade Secrets
 - Employment Liability Issues

Blog Law Developments: Defamation

- **Barrett v. Rosenthal, 40 Cal. 4th 33, 146 P.3d 510 (Cal. 2006).**
 - California Supreme Court recognized broad immunity for defamatory republications on Internet; extended defamation immunity under Section 230 of the Communications Decency Act to cover individual internet users
 - Facts of case involved operator of Internet discussion group, which distributed defamatory statements
 - Case viewed as protecting the free speech of bloggers; also viewed as a victory for online companies such as Google and AOL

Blog Law Developments: Defamation

- **John Doe v. Cahill, 884 A.2d 451 (Del. 2005).**
 - Delaware Supreme Court held that, to obtain discovery of an anonymous defendant's identity, the summary judgment standard applied, so that a defamation plaintiff had to submit sufficient evidence to establish a prima facie case for each essential element of the claim in question
 - Defendant had posted statements on a news agency's blog concerning the councilman's performance, using the alias "Proud Citizen." Plaintiffs had obtained an order requiring the ISP to disclose defendant's identity
 - Court held that no reasonable person would have interpreted Defendant's statements to be anything other than opinion, and thus that the statements were not sufficient to give rise to a prima facie case for defamation liability

Blog Law Developments: Defamation

Olson v. Brodkorb

- Blois Olson case against Michael Brodkorb, conservative blogger who writes the blog Minnesota Democrats Exposed
- Brodkorb was sued by Olson after Brodkorb suggested that Olson had criticized the congressional campaign of a democrat after she refused to hire Olson's New School Communications
- Court dismissed case saying that Brodkorb had the same legal protections as newspapers and traditional broadcasters against suits by public figures

Blog Law Developments: Defamation

- **Suit against University of Ottawa Professor Michael Geist in Canada (ABA Cyberspace Committee member)**
 - Geist wrote a commentary in The Toronto Star, in which he discussed two defamation suits that he said “have the potential to reshape free speech on the Internet in Canada.” Geist also linked to the sites that plaintiff alleges defamed him
 - Plaintiff alleging that a defendant publisher can be liable for referencing on the defendant’s blog a third party’s allegedly defamatory content published elsewhere

Blog Law Developments: Defamation

- **Best practices tip to bloggers for avoiding defamation liability**
 - Know what constitutes defamation and avoid making defamatory statements; take particular care with private figures
 - When you give your opinion on issues, avoid making assertions of fact; convey to your readers very clearly that you are just giving your opinion
 - Develop policy for dealing with the posting of comments; consider whether you should screen comments for defamatory content before they go live

Blog Law Developments: Copyright

- **Bloggers receiving DMCA takedown notices**
 - 17 USC Section 512 creates safe harbor immunity from copyright infringement for service providers that respond quickly to notices claiming that they are hosting or linking to an infringing site
 - If you disagree that the content is infringing, you can counter-notify.
 - ISP can keep its immunity by putting content back up after receipt of a counter-takedown notice, provided that no lawsuit is filed in the 10 business day period.

Blog Law Developments: Copyright

- **Practice tips for avoiding copyright liability with your blog**
 - Quote only small portions of copywritten works for criticism, commentary, or news; credit the author
 - Respond promptly to DMCA takedown notices
 - Avoid editing comments to your blog

Blog Law Developments: Employment

- **Increasing number of employee firing cases, where an employee blog prompted firing**
- **Best practices for employees:**
 - Consider posting anonymously and take steps to protect your anonymity
 - Include a well-drafted disclaimer
 - Be informed about and obey the laws and any corporate blogging policies in place

Blog Law Developments: Employment

- **Trend emerging in corporate world to hide blogs from public by keeping them internal: attempt to minimize liability**
- **Best practices tips for corporations:**
 - Develop corporate blogging policy, which should include such elements as:
 - a disclaimer
 - guidelines on what can and can't be disclosed and what can be discussed in the blog
 - a position on anonymous blogging
 - guidelines on appropriate blogging
 - Information on trademark and copyright laws that must be followed
 - Adopt and post disclaimer and guidelines on corporate blogs regarding the posting, editing, and removal of comments

Blog Law Developments: Trade Secrets

- **O'Grady v. Superior Court, 139 Cal. App. 4th 1423 (Cal. Ct. App. 2006).**
 - Decision prevented Apple Computer from forcing the disclosure of unnamed individuals who allegedly leaked information about new Apple products to online news sites
 - Viewed as a victory for bloggers in that it protected their status as journalists

Blog Law Developments: Trade Secrets

- **Best practices to avoid trade secret liability**
 - **For Corporations:**
 - Adopt a blogging policy, which reminds employees of their confidentiality restrictions in connection with blogging activities. It may be wise to advise employees of what types of information is considered confidential.
 - Consider equitable remedies if inappropriate trade secret disclosures are made.
 - Limit trade secret knowledge within company to those who “have to know” and adopt internal policies to promote the protection of trade secrets generally.
 - **For Employees:**
 - Avoid disclosing anything that can potentially be considered a trade secret by your employer.

Blog Law Developments: Courtroom Blogging

- Issues emerging with blogging from the courtroom
 - **State of New Hampshire v. Goupil, 908 A.2d 1256 (N.H. 2006).**
 - Defendant appealed a criminal conviction after juror posted negative opinion regarding criminal defendants and the judicial process in a blog
 - Court found no reversal was required, because defendant did not allege that other jurors knew about the blog and the statements on its face did not reference anything specifically related to defendant's case
 - Should jury instructions deal with issue of blogging?

Blog Law Developments: Courtroom Blogging

- **Best practices for courtroom bloggers:**
 - For jurors: wait until after the trial is over, and obey whatever admonitions you are given about blogging
- **Best practices for attorneys:**
 - Inquire on jury selection about a potential juror's internet presence, including blogging activities
 - Do some research to see what potential jurors, jurors, and witnesses are doing on the internet

Blog Law Developments: Lawyer Blogs

Lawyer Blog Controversy

- States of Kentucky and New York contemplated amending ethics rules to regulate lawyer blogs as legal advertising in 2006
- State of California has not as of yet taken any steps to regulate lawyer blogs but is contemplating changes to legal advertising rules
- Should lawyer blogs be protected by the First Amendment?

Blog Law Developments: Insurance

- **Lawsuits against bloggers raise liability concerns**
 - Potential limits of homeowner's insurance and umbrella policies; possibility of exclusions
- **Pros and cons of cyberinsurance; media risks or perils insurance**
- **Development of blogging liability policies**

Blog Law Developments: Insurance

- **Best practices for insuring blogging liability risk:**
 - Obtain media risks or perils insurance if you can afford it
 - Watch for new blogging liability policies
 - Be informed about the law and adhere to it

Blog Law Developments: Insurance

- **Controversy regarding malpractice coverage where law firm has blog:**
 - Potential professional liability insurance coverage exclusions
 - To date, no known malpractice lawsuits based on bad legal advice given on a lawyer blog (estimated to be 1800+ lawyer blogs currently in existence)
- **Chubb Insurance “clarification”**

Blog Law Developments: Insurance

- **Best practices for lawyer bloggers:**
 - Have a well-drafted disclaimer that the blog does not constitute legal advice
 - Keep blogs informational rather advisory in nature (although it can be debated as to what this actually means)
 - Consider purchasing separate insurance to cover blog

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